No. 87-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TIPPERARY REFINING CO.,
Petitioner

v.

THE UNITED STATES,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

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1. The government misstates the holding of this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), with respect to the standard to be applied in determining whether a later-enacted statute impliedly repeals an otherwise available Tucker Act remedy. In *Regional Rail* this Court held that the appropriate question is one of the intent of the legislature: " 'whether Congress intended to *prevent* . . . recourse [to the Tucker Act].' " 419 U.S. at 126, quoting the opinion of the Special Court in that case. And, the Court held, Congressional intent to make the Tucker Act remedy unavailable will not be inferred " 'unless there is "positive repugnancy" between the new [statute] and the [Tucker Act] that cannot be reconciled.' " 419 U.S. at 314. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-1018 (1984) is to the same effect. The Court emphasized,

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* The listing required by Rule 28.1 of this Court's Rules is found at page 1, footnote 1, of the Petition and remains accurate.

quoting *Regional Rail*, that "when two statutes are "'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" 467 U.S. at 1018 (quoting *Regional Rail*, 419 U.S. at 133-134; which quoted *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

Contrary to the government's implication (Opp. at 8), neither case held that there must be a threat of unconstitutional taking to save the Tucker Act remedy. The reference to the doubt of constitutionality in *Regional Rail* was in a paragraph simply applying the "canon of [statutory] construction" that it is advisable to avoid a statutory reading that would raise a constitutional question. 419 U.S. at 134. Similarly, *Ruckelshaus v. Monsanto* merely notes that its outcome moots a constitutional issue. 467 U.S. at 1019. Nothing in either holding indicates that its rationale depends on the need to avoid a constitutional issue.[1]

2. The government's opposition makes no attempt to show that there is any "clearly expressed" Congressional intention to "prevent . . . recourse" to the Tucker Act. *Regional Rail*, 419 U.S. at 126. Indeed, neither the ESA, the EPAA, nor their legislative history, makes any mention of the Tucker Act. Moreover, it is difficult, to say the least, to imagine that Congress wanted citizens to be

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[1] We submit, moreover, that there would indeed be a serious question of unconstitutional taking in the present case if the government, having exacted illegally high prices for crude oil in violation of its own contractual promise to comply with the DOE regulations, the Emergency Petroleum Allocation Act, and the Outer Continental Shelf Lands Act, could simply sit on that money and refuse to return it. Not denying this, the government engages in *non sequitur* by stating that this is not a problem because those claims "may go forward under the ESA and the EPAA" (Opp. at 9). The fact is that those questions will exist unless the holding in the present case is changed. Just as in *Regional Rail* and *Ruckelshaus v. Monsanto*, then, denial of a Tucker Act remedy in the present case raises a serious question of the constitutionality of the government's actions under the due process clause.

without remedy for government violations of both contractual promises to obey the price control regulations and the specific statutory command of section 27(b) of OCSLA, 43 U.S.C. § 1353(b), that the government abide by those rules.

3. The government asserts, however, that a congressional scheme preventing recourse to the Tucker Act in these circumstances can be gleaned from what it asserts is the command in section 211(a) of ESA that any *issue* involving the ESA, the EPAA, or the price control regulations may be heard only in the district court (Opp. at 7-10). Since the present case involves application of the regulations, the argument runs, the district court has exclusive jurisdiction over it. This argument lacks any merit.

a. The argument depends upon an aberrant reading of the phrase "cases or controversies *arising under* [the regulations]" in Section 211. The government does not deny that the obvious model for this phrase is the similar language in 28 U.S.C. § 1331, pursuant to which this Court held in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), that a state negligence action did not "arise under" federal law even though every significant liability issue required resolution of questions under the Federal Food, Drug, and Cosmetic Act. Under that rationale, this case "arise[s] under" the Tucker Act, which creates the right to recover for violations of contract and the OCSLA. The cases relied on by the government (Opp. at 7) for the contrary proposition, such as *Citronelle-Mobile Gathering Inc. v. Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979), do not support its position. They concern only the appellate jurisdiction of the TECA under section 211(b)(2) of the ESA vis-a-vis that of the circuit courts of appeals. No trial court's jurisdiction under section 211(a) was at issue, and no such case holds that the "arising under" language in that section renders any injured person to be without a remedy.

b. The government's position disserves the very policy it purports to promote. The government asserts that it was Congress's policy to have swift and uniform interpretation of the price control regulations (Opp. at 10). But that policy is not served by creating a class of cases in which one large seller of crude oil—the government itself—may ignore the regulations while everyone else must comply with them. That is non-swift and non-uniform application of the regulations.

Moreover, the government is seriously wrong in suggesting that Congress insisted that every EPAA issue be considered only in the district courts. Congress has permitted other courts to consider large classes of issues requiring interpretation of the ESA, EPAA and the price control regulations. Thus the policy of "uniformity" cannot be read to express a Congressional preference that a violation of the regulations go unremedied rather than have a court other than a district court consider it. Most importantly, we showed in the Petition (at 20-21) that the Claims Court was explicitly given jurisdiction by Congress to rule upon the same regulations at issue here in the context of controversies under the Crude Oil Windfall Profits Tax Act, 26 U.S.C. § 4986 *et seq.*, which statutorily incorporates the DOE crude oil pricing regulations. Petition at 20. The government fails to respond to this showing. Moreover, as the government is forced to admit, section 211(a) of the ESA explicitly allows issues involving the ESA, EPAA, or the regulations to be ruled upon by state courts if they arise as part of a defense, so long as the issue is not the constitutionality or validity of the statute or agency action. Opp. at 8, fn 7. Thus the EPAA regulatory issues involved in the present case could arise and be ruled upon in the courts of any state.[2] It would thus not be anomal-

[2] For example in an action by a seller asserting that the buyer had failed to pay the full contract price, the buyer could raise the defense that the contract price could not be paid because the seller's

ous for the Claims Court to rule on such issues in a contract case that could not be brought anywhere else.

c. The clear implication of TECA and Federal Circuit holdings is that this cause does not "arise under" the EPAA or its regulations within the meaning of section 211(a); therefore the Federal Circuit was wrong to hold that this case is within the exclusive jurisdiction of the district courts. The government's footnote response to this assertion (Opp. at 10, fn 10) tries to avoid its force by making the unsupported claim that the case arises under the EPAA although no relief is available. But that is not the reasoning of the TECA itself, which held in *Lunday-Thagard Co. v. United States Department of the Interior*, 773 F.2d 322, 324 (TECA), *cert. denied*, 474 U.S. 1055 (1987) that the ESA "does not provide the plaintiff with a cause of action for damages against the United States, except in fifth amendment taking cases." Thus that court's interpretation of the ESA is quite plainly that Congress created no route of redress in that statute for damages against the government. Therefore the present case does not "arise under" it, and section 211(a) of the ESA is inapplicable.

d. Finally, the government correctly points out that in *Merrell Dow*, this Court instructed that jurisdictional statutes be interpreted to give effect to their underlying purposes (Opp. at 10 and 9, fn 9). But the interpretation of the Federal Circuit permits the government's violation of its own regulation to go unchecked, leaves the petitioner without any remedy, creates a sizeable loophole in the enforcement scheme of the EPAA and ESA, and permits the Tucker Act to be partially repealed by implication. The government's claim that Congress intended these results is unsupported, and, we submit, could not be accepted without the most explicit and un-

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upper-tier crude certification was invalid. That defense could be ruled upon by a state court; it is the same issue raised by the petitioner as plaintiff below.

avoidable expression of Congressional intent. Such is the holding of *Regional Rail*, from which the holding of the Court below represents a significant departure.[3]

CONCLUSION

For the foregoing reasons, as well as those in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[3] The government tries to assert that the failure to exhaust administrative remedies that was the Federal Circuit's ground for dismissal of the claims concerning the post-decontrol period applies with equal force to the period of controls. Opp. 12-13. The courts below did not rely on that ground (Pet. App. 12a-13a), although it was strenuously argued by the government. For the pre-decontrol period, the official and undeviating agency position was that Interior did not have to comply with the DOE's price certification regulations. It refused to respond to written requests to claims that it was violating the regulations. Joint Appendix on Appeal, at p. 00271. A 1983 letter from Tipperary to Interior raising this issue was never responded to. *Id.* at p. 00332. Certainly, any further attempt to raise the question with the agency would have been futile and, thus, not required. *E.g., Bowen v. City of New York*, 476 U.S. 467, 485 (1986). It is clearly for these reasons that the courts below limited their holding on exhaustion to the post-decontrol period.